FILED
MAR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

(15)

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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QUESTION PRESENTED

Whether the statutory requirement for the Federal Communications Commission to award a qualitative enhancement for minority ownership in comparative licensing proceedings violates the equal protection component of the fifth amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 873 F.2d 347. The orders of the court of appeals denying the petition for rehearing and suggestion of rehearing en banc (Pet. App. 96a, 98a) are not reported. The memorandum opinion and order of the Federal Communications Commission granting the license application to petitioner's competitor, Rainbow Broadcasting Co. (Pet. App. 60a-63a), is not reported. The memorandum opinions and orders of the Federal Communications Commission on remand from the court of appeals (Pet. App. 48a-51a, 52a-57a) are reported at 3 FCC Rcd 866 and 2 FCC Rcd 1474, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 94a) was entered on April 21, 1989. The orders of the court of appeals denying rehearing and rehearing *en banc*

were entered on June 21, 1989. The petition for a writ of certiorari was filed on September 18, 1989. The petition was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of the Constitution of the United States, the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*, and other statutes are set forth at Pet. App. 161a-164a.

STATEMENT

A. Background

1. *The Comparative Licensing Process*

In the Communications Act of 1934, Congress assigned to the Federal Communications Commission exclusive authority to grant licenses, based on the "public interest, convenience, and necessity," to construct and operate radio and television broadcast stations in the United States. *See* 47 U.S.C. 151, 301, 303, 307, 309. When the FCC compares mutually exclusive applications for new radio or television broadcast stations, it looks at two principal factors: diversification of control of the media of mass communications and the best practicable service to the public. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereafter *1965 Policy Statement*). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 972 (D.C. Cir. 1984). In assessing which applicant will provide the best practicable service to the public, the Commission considers a variety of factors including proposed participation in day-to-day station management by owners (commonly referred to as the "integration" of ownership and management), the applicants' past broadcast records, and efficient use of the frequency. *1965 Policy Statement*, 1 F.C.C.2d at 397-99. Integration of ownership and management is a factor of "substantial importance" in determining which applicant is superior under the best practicable service objective. *Id.* at 395. This factor has a "quantitative" aspect, i.e., the degree to which the

owner or owners will be involved in the station's management. It also has "qualitative" aspects. Among the attributes viewed by the Commission as qualitatively enhancing an integration proposal, and which may be of decisional significance when there are no appreciable quantitative differences, are the local residence, civic participation, past broadcast experience, race and gender of the owner. *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604-07 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

2. *Development of Minority Ownership Policies*

a. *Credit for Minority Ownership in Comparative Licensing Proceedings*

The issue of minority ownership as a factor in the comparative evaluation of broadcast applicants was not specifically addressed in the *1965 Policy Statement*. The Commission did emphasize in that policy statement, however, its more general, and longstanding, efforts to increase diversity in radio and television programming by increasing diversity of ownership of broadcast stations.[1] The Commission explained that it has been committed to the concept of diversity of control of broadcast stations because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *1965 Policy Statement*, 1 F.C.C.2d at 394.

In the late 1960s, following the adoption of the Civil Rights Act of 1964 and the *Report of the National Advisory Commission on Civil Disorders* (1968) (hereafter *Kerner Commission Report*), the Commission began to focus its diversity-related concerns on the very small participation by minorities in the broadcasting industry. The Commission acted first in the area of employment by

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[1] *1965 Policy Statement*, 1 F.C.C.2d at 394; *see also FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Storer Broadcasting Co. v. United States*, 220 F.2d 204, 209 (D.C. Cir. 1955), *rev'd on other grounds*, 351 U.S. 192 (1956).

adopting regulations that sought to ensure that broadcast licensees did not discriminate against minorities in their employment practices. *See, e.g., Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).[2]

The Commission stated that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license." *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 769 (1968). The Court observed in 1976 that FCC regulations dealing with employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

The Commission also sought to enhance broadcast program diversity by requiring station owners to "ascertain" the needs, interests and problems of substantial segments of their communities, specifically including "minority and ethnic groups" and to direct their non-entertainment programming to those ascertained needs. *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 419, 442 (1976).

These initial steps to improve minority participation in broadcasting did not involve the consideration of race as a factor in licensing decisions. On the contrary, the Commission refused to give credit to an applicant in a comparative licensing proceeding solely on account of the race of its owners, where the record did not give assurance that the owner's race would be likely to affect the

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[2] *See also Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C. 2d 354 (1975); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

quality of the station's broadcast service to the public. *See Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17-18 (Rev.Bd.), *rev. denied*, 37 F.C.C.2d 559 (1972), *rev'd*, *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

The court of appeals, however, rejected the Commission's position that the circumstances must give an "advance assurance of superior community service attributable to such Black ownership and participation . . . ." *TV 9, Inc. v. FCC*, 495 F.2d at 938. "Reasonable expectation," the court held, "not advance demonstration, is a basis for merit to be accorded relevant factors." *Ibid.* The court explained:

> It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . . We hold only that when minority ownership is likely to increase diversity of content, especially on opinion and viewpoint, merit should be awarded.

Id. at 937-38.

Two years later the court emphasized that "[t]he entire thrust of *TV 9, Inc.* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation' without 'advance demonstration,' gives them relevance." *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C.Cir. 1975) (footnotes omitted). *See also West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 610-11.

Following the decisions of the court of appeals in *TV 9, Inc.* and *Garrett*, the Commission announced that minority ownership and participation would be considered a "plus factor" in a comparative hearing in determining which among competing license applications to grant. *See WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978). This "plus factor" is weighed together with all other relevant

factors and is awarded only to the extent that a minority owner will actively participate in the day-to-day management of the station. *See TV 9, Inc.*, 495 F.2d at 941; *WPIX, Inc.*, 68 F.C.C.2d at 411-12. The minority enhancement credit subsequently was extended to applicants that proposed to include female owners who would be involved in the station's operations. *See Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev.Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981); *Horne Industries*, 94 F.C.C.2d 815, 822-24 (Rev.Bd. 1983), *rev. denied*, 56 Radio Reg.2d (P&F) 665, 668 (1984).[3]

b. *Other Minority Ownership Policies*

In 1978 a task force formed by the FCC to examine the issue of minority ownership of radio and television broadcast stations issued a report finding that "the minority community continues to be underrepresented among broadcast station owners" and that this situation was "a direct result" of past society-wide discrimination. FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting* Summary at 1; 7 (1978) (hereafter *Minority Task Force Report*). The task force found that significant barriers, including lack of information, lack of adequate financing and inexperience in the industry, had hampered the growth of minority ownership. *Id.* at 8-29. The task force recommended that further steps should be taken by the FCC to encourage and facilitate the entry of more minorities into ownership of broadcast stations. *Id.* at 1, 8, 30.

The FCC reviewed the findings of the *Minority Task Force Report* and concluded that there was a need for further action to address the " '[a]cute underrepresentation of minorities among the owners of broadcast properties . . . .' " *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) (hereafter *1978 Minority Policy Statement*) (Pet. App. 130a), *quoting Minority Task Force Report* at 1. The Commission found that its initial steps involving employment and ascertainment had not been sufficient. The Commission noted, referring to the findings of the task force, that fewer than one per cent of the 8500 commercial radio and television stations operating in 1978 were controlled by minorities, although minorities constituted 20 percent of the population. *See 1978 Minority Policy Statement*, 68 F.C.C.2d at 981, *citing, Minority Task Force Report* at 1.[4] The Commission found that although "the broadcasting industry has on the whole responded positively" to previous FCC initiatives, "the views of racial minorities continue to be inadequately represented in the broadcast media." *1978 Minority Policy Statement*, 68 F.C.C.2d at 980 (footnotes omitted).

Concluding that "additional measures are necessary and appropriate," *1978 Minority Policy Statement*, 68

[3] Contrary to petitioner's apparent view, the FCC's policy of providing credit for female ownership is not an issue in this case. The FCC held that the minimal enhancement credit received by Rainbow Broadcasting Co. for its female ownership was not determinative (Pet. App. 49a-50a n.1; 61a), and the court of appeals expressly declined to consider the legality of the gender preference. *See id.* at 10a n.5; Amicus Br. for U.S. at 5 n.5.

[4] *See also* United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 280 (1971) ("[O]f the approximate[ly] 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities."), *cited in TV 9, Inc.*, 495 F.2d at 937 n.28; *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (1971) ("According to the uncontested testimony of petitioners, no more than a dozen of [the] 7,500 broadcast licenses issued are owned by racial minorities."); *Mid-Florida Television Corp.*, 37 F.C.C.2d at 563 (Commissioner Hooks, concurring) ("While there is still no black ownership of a television station, I am told that black ownership of radio stations may be approaching the astronomical figure of 20 out of nearly 7,000."); United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort—1974* 49 (1974) ("In 1973, there were over 7,000 radio stations and 1,000 television stations operating in the United States. Of these, only 33 radio stations located in 20 states and the District of Columbia and no television stations were owned by minority group members.").

F.C.C.2d at 981, the Commission adopted additional policies to encourage greater minority ownership of broadcast stations.[5] Those policies, like the minority enhancement credit in comparative licensing proceedings, were based on the Commission's belief that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming . . . " and that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Ibid.* The Commission emphasized that lack of minority representation among owners of broadcast stations "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" (*ibid.*), by serving "the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation . . . ." *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1265 (1982), *aff'd, West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

3. *Congressional Action*

Congress has repeatedly endorsed the goals of and directed the FCC to continue to implement the credit for minority ownership in comparative proceedings, as well as other FCC minority ownership policies.[6] Moreover,

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[5] *See* 68 F.C.C.2d at 982-84. One of the policies adopted in that proceeding—the distress sale policy—is before the Court in No. 89-700.

[6] As a foundation for the statutory enactments discussed below, Congress has held numerous hearings to explore the problem of lack of minority ownership of broadcast stations. *See, e.g., Hearing*

Congress has expanded on policies adopted by the Commission. In 1982, for example, Congress amended the Communications Act to authorize the FCC to award licenses by a system of "random selection," or lottery. The legislation directed the FCC, in creating any such procedure, to grant "an additional significant preference . . . to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A). The conference report accompanying the bill stated that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765 (Conf. Rep.), 97th Cong., 2d Sess. 43 (1982) (hereinafter H.R. Rep. No. 765). Consequently, this provision for a minority preference was intended to be "[o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into . . . the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media . . . ." *Id.* at 44.[7]

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on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) [hereinafter *1989 Hearing on Minority Ownership*]; *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986) [hereinafter *Hearings on H.R. 5373*]; *Minority Participation in the Media—Hearings before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter *1983 Hearings on Minority Participation*]; *Parity for Minorities in the Media—Hearings on H.R. 1155 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter *Hearings on H.R. 1155*].

[7] Congress had enacted a similar statutory scheme a year earlier. *See* Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981); H.R. Rep. No.

In 1987, after the FCC had opened an inquiry concerning the validity of its minority ownership policies (*see* page 13 below), Congress included the following provision in the FCC's appropriations legislation:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R. 2d [1301] (1982) and Mid-Florida Television Corp., [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

Continuing Appropriations Act For Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329, 1329-31 (1987). The Senate Appropriations Committee, where the provision originated, explained: "The Congress has expresed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of

208 (Conf. Rep.), 97th Cong., 1st Sess. 897 (1981). The FCC chose not to implement that statute for several reasons, including a "lack of specificity in both the statute and the legislative history" regarding preferences to be accorded minorities in any lottery licensing system. *Random Selection/Lottery Systems*, 89 F.C.C.2d 257, 279 (1982). Congress enacted a revised statute within several months, re-emphasizing the seriousness with which it viewed the "severe underrepresentation of minorities" and the importance of provisions in the statute designed to enhance diversity of ownership by increasing the number of minority owners of radio and television stations. *See* H.R. Rep. No. 765 at 43; Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (1982).

ownership results in diversity of programming and improved service to minority . . . audiences." S. Rep. No. 100-182, 100th Cong., 1st Sess. 76 (1987) (hereinafter S. Rep. No. 100-182). Congress has twice extended its prohibition of the use of appropriated funds on modification or repeal of the minority enhancement credit and other minority ownership policies.[8]

4. *Administrative Proceedings In This Case*

This case involved a comparative proceeding to select one among three mutually exclusive applications filed by petitioner Metro Broadcasting, Inc., Rainbow Broadcasting Co. and Winter Park Communications, for a license to construct a new UHF television station to serve the Orlando, Florida metropolitan area. Following an evidentiary hearing, the Administrative Law Judge granted Metro's application, preferring Metro over Winter Park Communications. *Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073 (ALJ 1983). The ALJ had disqualified Rainbow Broadcasting Co. from the comparative consideration for what he found was lack of candor in its application. *Id.* at 1086-87; *see* Pet. App. 66a. On review of the ALJ's initial decision, the Commission's Review Board disagreed with the ALJ's candor finding and concluded that Rainbow was qualified. Thus, it proceeded to consider Rainbow's comparative showing, which it found was superior to Metro's. Accordingly, the Board reversed the ALJ's grant to Metro and awarded the construction permit to Rainbow. Pet. App. 64a.

Specifically, the Board concluded that Rainbow's proposal for integration of ownership and management was

[8] *See* Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989); *see also* S. Rep. No. 101-144, 101st Cong., 1st Sess. 86 (1989); H.R. Rep. No. 101-299 (Conf. Rep.), 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 20, 1989).

both quantitatively and qualitatively superior. On quantitative grounds, the Board found a "clear" difference between the applicants. Pet. App. 87a. Owners of Rainbow with 90% interest would participate full time in the station's operation while owners of Metro with only 79.2% interest would be full time participants. In addition, Rainbow was awarded a substantial qualitative enhancement credit to its integration proposal for minority participation by 90% of its owners in contrast with Metro's minority credit for only 19.8% of its owners. The Board also found that Rainbow was entitled to "very slight[]" credit for its 5% female ownership. *Ibid.* Rainbow also received credit for its broadcast experience because the past broadcast experience of one, an 85% owner, was found to be much more significant and was attached to larger ownership than that of Metro's principals having broadcast experience. Metro was awarded a moderate preference for superior local residence and civic participation. Overall, the Board concluded that although the qualitative comparison between Rainbow and Metro was close, Rainbow's substantial minority enhancement credit in conjunction with its preference for broadcast experience, outweighed Metro's local residence and civic participation advantage. In sum, the Review Board awarded Rainbow a slight overall integration preference over Metro. *Id.* at 86a-88a.

The Commission denied review of the Board's decision, stating that it "agree[d] with the Board's resolution of the case." Pet. App. 61a. In its order, the Commission made clear, however, that the credit awarded Rainbow for its female ownership did not affect the outcome of the case. *Ibid. See also* Pet. App. 49a n.1.

5. *Intervening Developments*

Metro sought judicial review of the Commission's order in the court of appeals, but disposition of its appeal was delayed because the court granted, at the Commission's request, a remand of the record for further consideration in light of a separate non-adjudicatory inquiry proceeding at the Commission to explore the validity of the

minority and female ownership policies including the minority enhancement credit. *See Notice of Inquiry on Racial, Ethnic or Gender Classification (MM Docket No. 86-484)*, 1 FCC Rcd 1315, 1317-18 (1986).[9] On remand, the Commission concluded initially that the choice in this particular licensing proceeding between Rainbow and Metro could well depend on whatever conclusion the Commission came to in its general inquiry in Docket 86-484. Accordingly the Commission ordered the licensing proceeding held in abeyance pending further action in Docket 86-484. *See Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987) (Pet. App. 52a).

Prior to the Commission's completion of its inquiry in that proceeding, Congress enacted and the President signed into law legislation that appropriated funds for Commission salaries and expenses for fiscal year 1988, with the aforementioned proviso that prohibited the Commission from spending any appropriated funds to reexamine or change any of the minority ownership policies. *See* page 10 above. In compliance with this legislation, the Commission ordered its MM Docket No. 86-484 closed, thereby terminating the inquiry. *See Order (MM Docket No. 86-484)*, 3 FCC Rcd 766 (1988). In addition, the Commission reaffirmed its grant of the license

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[9] That inquiry grew out of the court of appeals' decision in *Steele v. FCC*, 770 F.2d 1192 (D.C.Cir. 1985), *vacated & reh. en banc granted*, Order of Oct. 31, 1985, *remanded*, Order of Oct. 9, 1986, *mandate recalled*, Order of June 9, 1988, *remanded*, Order of Aug. 15, 1988. In that case a panel of the court of appeals had held that the FCC lacked statutory authority to grant enhancement credits in comparative licensing proceedings to women owners. Although the court observed that "the Commission's authority to adopt minority preferences . . . is clear" (*id.* at 1196), the court's opinion nevertheless raised questions concerning the FCC's minority ownership policies. In a request for remand in the *Steele* case, the Commission explained that it had begun to have reservations, in light of developments in the law, that it had not established an adequate factual basis for its policies encouraging female and minority ownership. Upon grant of its remand request, the Commission began the Docket No. 86-484 inquiry.

in this case to Rainbow Broadcasting Co. *See Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (Pet. App. 48a).

B. The Court of Appeals' Decision

The court of appeals affirmed. The court concluded that "[t]he issue regarding the legality of the FCC's use of a qualitative enhancement for minority ownership is easily resolved because this case is controlled by our decision in *West Michigan*, 735 F.2d 601." Pet. App. 10a.[10] Noting that *West Michigan* had ruled on the same policy, the court pointed out that two principal factors had led the *West Michigan* court to find that that policy " 'easily passes constitutional muster,' " (*ibid.*):

> "First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media."

Id. at 10a-11a, *quoting*, *West Michigan*, 735 F.2d at 613-14 (emphasis in original).

The court below concluded that the holding in *West Michigan* was not affected by the Court's subsequent decisions in the area of race-conscious policies. Pet. App. 12a. *West Michigan* had relied primarily on the Court's decisions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Regents of the University of California v. Bakke*,

[10] The court stated at the outset that it would "consider only the legality of the FCC's use of a qualitative enhancement for minority ownership" in light of the Commission's determination that "the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation" (Pet. App. 10a n.5).

438 U.S. 265 (1978), and the court of appeals observed that subsequent decisions, in particular *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), had not "repudiated" either of those cases. Pet. App. 12a. Indeed, the court stated that Justice O'Connor's opinion in *Croson* "relied heavily on the reasoning of *Fullilove* and . . . none of the opinions in [*Croson*] expresses any disagreement with *Bakke*, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination." Pet. App. 13a.

The court of appeals also found significant two "crucial differences between the set-aside program upheld in *Fullilove* and the plan struck down in [*Croson*], and in both respects the FCC's policy is more similar to the *Fullilove* program . . . ." Pet. App. 13a. The court pointed to the fact that the plan at issue in *Croson* involved " 'an unyielding racial quota' " (*ibid.*), while the policy applied by the FCC "is even more flexible than the *Fullilove* set-aside plan: it does not involve any quotas . . . and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses." *Ibid.* In addition, the court noted the distinction made in *Croson* between programs enacted by Congress and those adopted by states or local governments. *Croson* emphasized that " 'in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress . . . .' " *Croson*, 109 S.Ct. at 718, *quoting*, *Fullilove*, 448 U.S. at 483. The minority enhancement policy, the court of appeals pointed out, had received Congress' "express approval." Pet. App. 14a.[11]

On June 21, 1989, the court of appeals denied petitions for rehearing and suggestions for rehearing en

[11] Judge Williams dissented from the court's holding with respect to the constitutionality of the minority enhancement. In his view, the *West Michigan* decision has been "largely undermined" by *Croson* and by *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *See* Pet. App. 18a.

banc filed by Metro Broadcasting Co. and by Winter Park Communications. Pet. App. 96a, 98a.

SUMMARY OF ARGUMENT

The minority enhancement policy is a race-conscious measure that has been ordered by Congress in each of the last three years as a part of the FCC's appropriations legislation. The Court should afford "great weight" to Congress' judgment that an increase in minority ownership of broadcast stations will enhance the diversity of broadcast programming to the benefit of both the minority and non-minority audience. Congress had an ample basis for acting to enhance broadcast diversity. Its attention has been focused on the problem of a lack of minority participation in the broadcast industry for at least six years prior to its adoption of the minority enhancement policy in 1987, during which time it held numerous hearings on this subject.

The promotion of diversity in broadcast programming is a sufficiently "compelling" governmental interest to permit the use of a race-conscious policy. A diversity of broadcast programming has long been an important objective underlying the regulation of broadcasting, and the absence of minority participation in broadcasting has a deleterious effect on programming diversity. Membership in a minority group is likely to provide distinct perspectives on matters of contemporary public concern that are relevant in assessing a person's potential contribution to diversity, whether the desired diversity is sought for a university classroom or for the broadcast airwaves. When the process of determining the composition of broadcast programming involves the direct participation of minorities, the programming is more likely to reflect fairly the different perspectives of minority groups, to the benefit of both the minority and non-minority community.

The Court recognized in 1976 the relationship between programming in the public interest and minority participation in the programming process as employees of broadcast stations. *NAACP v. FPC*, 425 U.S. 662, 670 n.7

(1976). Minority participation as owners of broadcast stations is even more significant because the FCC has long regarded ownership as a key determinant of broadcast program content.

There is a compelling need for the broadcast industry to reflect fairly the viewpoints and perspectives of minority groups. Before Congress acted, both the Kerner Commission in 1968 and the United States Civil Rights Commission in 1977 had warned of the serious consequences of allowing the broadcast medium, which the Court has described as "demonstrably a principal source of information and entertainment for a great part of the Nation's population," *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968), to be dominated by whites.

The minority enhancement and other statutory policies that seek to further minority ownership of broadcast stations should also be viewed as an effort by Congress to remedy the effects of past discrimination. Congress can define and remedy the effects of prior society-wide discrimination, at least insofar as its remedial action is directed at an industry whose owners are selected by a federal licensing agency and whose ownership patterns were established at the same time societal discrimination against minorities was at its peak. Insofar as Congress was remedying discrimination, it should receive more than customary deference because of its special responsibility, as set forth in the fourteenth amendment, to enforce the constitutional right of equal protection.

The minority enhancement credit is narrowly tailored to serve its objectives. As discussed above, membership in a minority group is likely to provide a distinct perspective on public issues that can reasonably be expected to influence the programming of minority owned stations.

The FCC, and subsequently Congress, turned to the minority enhancement credit and related race-conscious licensing measures only after seeking for many years to encourage diversity of ownership without consideration of race. When the agency's general approach to diversification did not succeed where minorities were con-

cerned, and the *Kerner Commission Report* dramatically brought the problem to the FCC's attention, the FCC did not proceed immediately to adopt the minority enhancement credit and other race-conscious licensing policies. The agency instead first resorted to rules which sought to require licensees to employ more minorities and to ascertain the needs of their minority audience. Before Congress adopted the minority enhancement credit in 1987, the FCC had also relaxed the minimum showing necessary to demonstrate financial qualifications to receive a broadcast license, and had increased the number of new broadcast stations available for initial licensing. In view of the failure of the FCC's various initiatives to improve significantly the level of minority participation, Congress properly exercised its broad discretion to select the methods for pursuing its objectives when it compelled the Commission to utilize the minority enhancement credit and other race-conscious licensing policies. The methods Congress has chosen do not undermine the important countervailing goal of stability in the broadcast industry.

The burden imposed on innocent non-minorities by the minority enhancement credit is permissible. The minority enhancement credit is only one of many factors considered by the Commission in granting broadcast licenses. No non-minority is deprived from having all of its comparative attributes weighed, and the minority enhancement credit does not insure that a minority applicant will prevail. Moreover, the policy involves no attempt to remove existing owners for the purpose of making room for new minority owners.

ARGUMENT

I. THE MINORITY ENHANCEMENT POLICY REFLECTS A DELIBERATE AND CONSIDERED CONGRESSIONAL CHOICE.

A. The Policy Is Statutorily Mandated.

The policy of granting enhancement credit to minority owners who will also work at the proposed station as one factor in the FCC's multi-factor evaluation of competing

applicants for a broadcast license reflects a deliberate congressional choice. Congress has repeatedly addressed the problem of lack of minority ownership of radio and television stations. It has found that there is a need for increased minority ownership, endorsed policies implemented by the FCC including the minority enhancement credit, enacted programs of its own creation and ultimately enacted into law the minority enhancement credit and other programs to increase minority representation among radio and television station owners.

In the three most recent appropriations acts governing the FCC, Congress has explicitly instructed the Commission to continue to implement the minority ownership policies, including the policy "with respect to comparative licensing." Pub. L. No. 100-202, 101 Stat. 1329-31 (1987).[12] The Senate Report on that legislation explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 100-182 at 76.

The Senate Report in 1987 noted that in 1982 Congress enacted legislation authorizing the use of "random selection" in the FCC licensing process, but specifically requiring that significant preferences for minority applicants be incorporated into any random selection licensing scheme. *Ibid.* *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. 309(i)(3)(A) and (C)(ii).[13] The

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[12] *See also* Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

[13] Contrary to the views of the petitioner and the United States (Pet. Br. at 45 n.109; U.S. Br. at 19) the 1982 legislation is rele-

conference report on that legislation found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765 at 43. The report also found ownership preferences to be "an important factor in diversifying the media of mass communications" (*ibid.*) and stated that "[t]he underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of program content." *Id.* at 40. As the conference report explained, "[i]t is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." *Id* at 43.

The conference report expressly endorsed the FCC's minority ownership policies, including the minority enhancement credit, as proper means to achieve diversity. *See* H.R. Rep. No. 765 at 44 ("Evidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts. See, in this regard, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978)."). As the court of appeals stated in *West Michigan*, not only did Congress make clear its approval of the Commission's minority enhancement policy, its enactment of the lottery legislation "was intended to assure that the FCC's minority ownership policies would not be abandoned if the comparative evaluation process of which they were a part was abandoned." *West Michigan*, 735 F.2d at 613 & n.17.

Thus Congress through the appropriations legislation and the 1982 lottery legislation has codified the FCC's minority ownership policies and essentially endorsed the FCC's basis for those policies. Specifically, those policies

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vant in determining Congress' intent in enacting into law the minority enhancement credit for 1988 and subsequent fiscal years. *See Fullilove*, 448 U.S. at 463-467 (plurality opinion); *id.* at 503 (Powell, J.).

reflected the Commission's view that diversity in broadcast programming is critical, that there is a need for race-conscious remedies like the minority enhancement credit in licensing broadcast stations, and that increasing ownership diversity leads to increased program diversity.[14] Far from being "delphic," as the United States describes Congress' action (U.S. Br. at 19), Congress' repeated re-enactment of the 1987 legislation in successive years, in the context of consistent Congressional support over nearly a decade for race-conscious policies designed to increase minority ownership of broadcast stations, reflects its clear intent to enact into law the minority enhancement credit.

Moreover, the contentions of petitioner that these congressional actions do not enact the policies into law because they were taken in the context of appropriations legislation are groundless. *See* Pet. Br. at 49-50; *see also* U.S. Br. at 19. The Court has recognized that when Congress makes its intention clear, there is no question that it may take any action within its power through an appropriations act or any other duly enacted form of legislation. *United States v. Will*, 449 U.S. 200, 221 (1980), *citing*, *United States v. Dickerson*, 310 U.S. 554, 555 (1940); *Belknap v. United States*, 150 U.S. 588, 594 (1893); *United States v. Mitchell*, 109 U.S. 146, 150 (1883). Where a policy that Congress wishes to embody in statutory form is already in existence at the agency level, Congress does not have to spell out in a statute the specific provisions of the policy in issue, but instead, if it chooses, Congress can accomplish the same purpose by simply ordering the agency to keep the policy intact. Here, there can be no serious doubt that Con-

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[14] *See Winter Park*, 873 F.2d at 355 (Pet. App. 14a) ("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses."); *see also West Michigan*, 735 F.2d at 615.

gress' intention in three successive appropriations acts was to enact into law the minority enhancement credit.[15]

Because the minority enhancement credit has been statutorily mandated, the present case thus requires the Court "to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). In performing this task, the Court accords "great weight" to Congressional judgments. *Rostker v. Goldberg*, 453 U.S. at 64, quoting *CBS, Inc. v. DNC*, 412 U.S. 94, 102 (1973), even where fundamental constitutional rights are involved. *Ibid.; Fullilove*, 448 U.S. at 472 (plurality opinion). Congress is entitled to at least this "customary deference."[16]

B. Congress Had An Ample Basis On Which To Codify The Policy.

In its consideration and enactment of legislation dealing with minority ownership of broadcast stations, Congress had available to it ample evidence upon which to base its conclusion that there is a need for these limited remedial efforts in the broadcast area. For example, the conference report accompanying the 1982 lottery legislation stated that "[e]vidence of the need for such preferential treatment has been amply demonstrated by the

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[15] Petitioner's and the United States' reliance on *TVA v. Hill*, 437 U.S. 153 (1978) is misplaced. *See* Pet. Br. at 49-50; U.S. Br. at 19. As the Court has explained, the narrow holding of that case on the issue relevant here is that "courts should be wary of inferring congressional intent to alter the force of existing law from an Appropriations Act." *Ramah Navajo School Board, Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 842 n.6 (1982), *citing*, *TVA v. Hill*, 437 U.S. at 189-91. Congressional intent in these appropriations act is clear, as discussed above. And Congress did not repeal or alter existing law, but rather enacted into law long-standing FCC policies.

[16] *Rostker v. Goldberg*, 453 U.S. at 64. When Congress is enforcing the constitutional right of equal protection, it is entitled to more than customary deference. *See* pages 34-35 below.

Commission, the Congress, and the courts." H.R. Rep. No. 765 at 44. The conference report referred specifically to the FCC's *1978 Minority Policy Statement* and the related *Minority Ownership Task Force Report*. The Minority Ownership Task Force had found that minorities "continue[d] to be underrepresented among broadcast station owners" and that significant barriers in the areas of financing, industry experience and information about ownership opportunities continued to "hinder the entrance of minority broadcasters." *Minority Task Force Report* Summary at 1.

The FCC's *1978 Minority Policy Statement* endorsed these findings, concluding that "additional measures are necessary and appropriate" to address a situation in which "the views of racial minorities continue to be inadequately represented in the broadcast media." 68 F.C.C.2d at 980-81 (footnote omitted). The conference report also relied explicitly on the Court's decision in *Fullilove*[17] and on the decision of the court of appeals in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C.Cir. 1971), *clarified*, 463 F.2d 822 (D.C.Cir. 1972).[18] H.R. Rep. No. 765 at 44.

Congress has also regularly conducted hearings to acquire information with specific reference to partici-

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[17] Specifically, the conference report noted the Court's reference in *Fullilove* to numerous "congressional observations with respect to the effect of past discrimination on current business opportunities for minorities . . . ." 448 U.S. at 467 n.55. *See* H.R. Rep. No. 765 at 44.

[18] *Citizens Communications Center* did not involve a race-conscious policy. However, the conference report referred to language in the opinion in that case emphasizing that an important aspect of the public interest standard of the Communications Act "is the need for diverse and antagonistic sources of information. . . . 'The Commission . . . may also seek in the public interest to certify as licensees those who would speak out with fresh voices, would most naturally initiate, encourage, and expand diversity of approach and viewpoint.' . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." 447 F.2d at 1213 n.36. *See* H.R. Rep. No. 765 at 44.

pation by minorities in the broadcasting industry. *See* n.6 above. These hearings have provided extensive evidence of the severe underrepresentation of minorities in the ownership of radio and television stations.[19]

In addition, Congress was aware of conclusions of the *Kerner Commission Report* and the United States Commission on Civil Rights concerning the need for policies directed to the extreme underrepresentation of minorities in the broadcasting industry. *See Kerner Commission Report* at 201-12; United States Commission on Civil Rights, *Window Dressing on The Set: Women and Minorities in Television* (1977); United States Commission on Civil Rights, *Window Dressing On The Set: An Update* (1979). These reports were referred to repeatedly in various congressional hearings.[20]

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[19] *See, e.g., Hearings on H.R. 5373* at 1 (statement of Rep. Collins that fewer than 2% of stations minority owned); *id.* at 13 (statement of Rep. Wirth to same effect); *id.* at 89-90 (reporting figures compiled by FCC to same effect); *id.* at 116 (statement of broadcast industry executive to same effect); *1983 Hearings on Minority Participation* at 7 (statement of Wilhelmina Cooke, representative of Black Citizens for a Fair Media comparing minority ownership of 2% of broadcast stations to minority representation of 20% of population); *id.* at 21, 28-29 (statement of Paul Yzaguirre representing La Raza citing statistics on lack of Hispanic participation in broadcast industry); *id.* at 61-63, 138 (statement of Arnold Torres representing League of United Latin American Citizens to same effect); *id.* at 39 (statement of Peggy Charren representing Action for Children's Television citing lack of minority representation in both broadcast station and cable television system ownership); *Hearing on H.R. 1155* at 3 (statement of Rep. Collins citing statistics showing that fewer than 2% of broadcast stations and 1% of cable systems are minority owned); *id.* at 147 (ownership study done by National Ass'n of Broadcasters); *id.* at 192 (survey of "Minority Business Involvement in the Telecommunications Industry" prepared for the Minority Business Development Agency of the Department of Commerce).

[20] *See, e.g., 1983 Hearings on Minority Participation* at 7, 20, 101, 155. In addition, other studies by groups such as the NAACP, the Radio-Television News Directors Association, the Screen Actors Guild, the League of United Latin American Citizens and the National Association of Broadcasters were entered into the record of these hearings. *See id.* at 46, 47, 69, 170.

Most recently, the Congressional Research Service conducted a study of minority ownership and programming on broadcast stations which found (1) that minorities continued to be underrepresented among those controlling broadcast stations and[21] (2) that there is a "strong indication" that ownership of stations by minorities resulted in a greater degree of minority programming. *See* Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (1988) (hereafter *CRS Report*).[22]

Even if Congress had not given such extensive consideration in recent years to the question of increased participation by minorities in the broadcasting industry, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (plurality opinion). Indeed, Justice Stevens' dissent in *Fullilove* pointed out that the set-aside provisions of the legislation before the Court in that case were "not even mentioned in the . . . Reports of either the House or the Senate committee that processed the legislation, and was not the subject of any testimony or inquiry in any legislative hearing on the bill that was enacted." 448 U.S. at 549-50.

The plurality opinion in *Fullilove* relied extensively on a congressional report that drew "presumptions"

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[21] The *CRS Report* found that 13.4% of stations had one or more minority owners, but that minorities held a controlling interest in only 3.5% of stations. *See CRS Report* at CRS-9.

[22] The dissent below (Pet. App. 23a-29a) is certainly correct that the *CRS Report* does not *prove* a link between minority ownership and diverse programming. However, this Court has recognized that "'[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *FCC v. NCCB*, 436 U.S. at 796-97. With its flaws, which the *CRS Report* itself acknowledges (*see CRS Report* at Summary, CRS-1—CRS-5), its conclusions nevertheless lend support to similar conclusions reached in the reports published over a number of years by the FCC, the Kerner Commission, the Civil Rights Commission and congressional committees discussed above.

from statistical information demonstrating substantial underrepresentation by minorities as business owners. Referring to this information, the Chief Justice's opinion quoted favorably a congressional report that had observed that "'[t]hese statistics are not the result of random chance. The *presumption* must be made that past discriminatory systems have resulted in present economic inequities.'" 448 U.S. at 465 (Burger, C.J.), *quoting*, H.R. Rep. No. 94-468, 94th Cong., 2d Sess. 30 (1975) (emphasis added). Similar statistical materials led the conference report on the 1982 lottery legislation to conclude that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Rep. No. 765 at 43.

Justice Powell observed in *Fullilove* that Congress' "constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. . . . Congress is not expected to act as though it were duty bound to find facts and make conclusions of law." 448 U.S. at 502. Accordingly, he concluded that

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

Id. at 502-03. *See also City of Richmond v. J.A. Croson, Co.*, 109 S.Ct. 706, 719 (1989) (O'Connor, J.); *id.* at 736 (Scalia, J.). So too, here, Congress was not legislating in a vacuum when it enacted into law the minority enhancement credit and other minority ownership policies. The minority enhancement credit had been in effect for more than nine years as an administrative

policy before Congress enacted it into law, and Congress was aware of congressional, judicial and agency findings over an even longer period, including its own inquiries and experience relating to the need for remedial policies in the broadcast area as well as more general findings such as the ones cited in *Fullilove*, along with findings of the *Kerner Commission Report*, reports of the U.S. Commission on Civil Rights and the FCC. *See* H.R. Rep. No. 765 at 44; S. Rep. No. 100-182 at 76.

Whether there is some irreducible minimum of evidence Congress must have to support its policy judgment that there is a need to employ race-conscious policies is a question that the Court need not decide here. It is plain that the evidence before Congress in this instance exceeded any reasonable minimum that might apply.

II. THE MINORITY ENHANCEMENT CREDIT SERVES THE COMPELLING GOVERNMENTAL INTERESTS OF PROMOTING DIVERSITY IN BROADCAST PROGRAMMING AND REMEDYING DISCRIMINATION.

A. The Minority Enhancement Credit Furthers Broadcast Program Diversity, Which Is Analogous To The Interest In Student Body Diversity.

The minority enhancement credit and other minority ownership policies, which Congress subsequently has embodied in statutory form, were initially implemented at the Commission as methods for promoting diversity. The Commission has set forth in detail the diversity-related basis for its minority ownership policies:

> Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment. . . . [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

> . . . In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

1978 Minority Policy Statement, 68 F.C.C.2d at 980-81. The goal of the FCC's race-conscious policies, now mandated by Congress, is thus quite different from the "role model" theory criticized in *Wygant* (*see* 476 U.S. at 274-75) in that the FCC policies assume "that viewers and listeners of *every* race will benefit from access to a broader range of broadcast fare, not that consumers will inevitably gravitate towards programming disseminated by licensees of their own race." *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 942 (D.C.Cir. 1989), *cert. granted*, 110 S.Ct. 715 (1990) (Wald, C.J., dissenting) (emphasis in original).[23]

In the context of higher education, promotion of student body diversity has been found to constitute a sufficiently compelling government interest to warrant the use of race-conscious policies. *See Bakke*, 438 U.S. at 311-19 (Powell, J.) (concluding that race could be considered as one factor in a university's admission program because "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."). Justice O'Connor has observed that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 286 (O'Connor, J.), *citing Bakke*, 438 U.S. at 311-15 (Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-17 (Stevens, J., dissenting). *See also Croson*, 109 S.Ct. at 730 (Stevens, J., concurring). And Justice O'Connor added: "[N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Wygant*, 476 U.S. at 286 (O'Connor, J.).

[23] Metro and the United States are thus mistaken in their view (Pet. Br. at 38, U.S. Br. at 26) that the goal of the minority enhancement credit is analogous to the role model theory discussed in *Wygant*. *See also Waters Broadcasting Corp.*, 91 FCC 2d at 1264-65 (1982) ("[T]he public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs" but are based on the agency's prediction that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation. . . ."); *Clear Channel Broadcasting*, 83 F.C.C.2d 216, 221 (1980), *aff'd, Loyola Univ. v. FCC*, 670 F.2d 1222 (D.C Cir. 1982) ("[W]e believe that minority-controlled stations can have the additional function of educating nonminorities about minority viewpoints . . . ."); *1978 Minority Policy Statement*, 68 F.C.C.2d at 981.

Promoting diversity, in the context of broadcast station ownership, has repeatedly been found by the court of appeals to be a compelling government interest warranting use of race-conscious policies. In *TV 9, Inc.* the court of appeals noted the Commission's longstanding policy under the Communications Act of promoting diversity of ownership of broadcast stations along with the established connection between ownership diversity and the "diversity of ideas and expression required by the First Amendment." *TV 9, Inc.*, 495 F.2d at 937. The court also took note of the extreme underrepresentation of minorities in the ownership of broadcast stations. *See id.* at 937 n.28. Based on these considerations, the court concluded that

> when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has

> proven to be significantly influential with respect to editorial comment and the presentation of news.

Id. at 938 (footnotes omitted). *See also Garrett v. FCC*, 513 F.2d at 1063; *West Michigan*, 735 F.2d at 614. As discussed below, the Court should now conclude that the government's interest "in ensuring that all of its people have access to a wide and varied range of broadcast options" is "every bit as compelling as its interest in creating a diverse student body within a public university." *Shurberg*, 876 F.2d at 943 (Wald, C.J., dissenting) (footnote omitted).

The first amendment goal of achieving the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), clearly extends beyond the classroom. In particular the Court has repeatedly found that this goal properly underlies the FCC's regulation of the broadcasting industry in the public interest. *See FCC v. NCCB*, 436 U.S. at 795; *CBS, Inc. v. DNC*, 412 U.S. at 102; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969). Indeed, diversity is of critical importance in the broadcast context because "broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).[24] For those members of society who never have the opportunity to benefit from exposure to the diverse students and other sources of learning available at a university, the broadcast medium may well be their best opportunity to receive diverse "social, political, esthetic, moral, and other ideas and experiences." *Red*

[24] *See also* U.S. Commission on Civil Rights, *Window Dressing on the Set* at 1 ("Television plays the dominant role in the mass communication of ideas in the United States today. . . . Television does more than simply entertain or provide news about major events of the day. It confers status on those individuals and groups it selects for placement in the public eye, telling the viewer who and what is important to know about, think about, and have feelings about.").

Lion, 395 U.S. at 390; *see Shurberg*, 876 F.2d at 943 (Wald, C.J., dissenting).[25]

The dissent below has suggested that race is relevant in measuring a person's potential contribution to diversity only when the potential beneficiaries of diversity can personally "see individual members of ethnic groups as they are." *Winter Park*, 873 F.2d at 357 (Pet. App. 21a) (Williams, J., dissenting in part). Certainly, *a* benefit of ethnic diversity experienced firsthand is the removal of unfounded prejudices against the essential human worth of members of other racial and ethnic groups. There is no reason to conclude, however, that Harvard University, for example, believes that this is the only benefit to be obtained from the presence as students of members of minority groups.

In any event, the Court has previously referred approvingly to FCC regulations which were premised on the judgment that the audience for broadcast programming will benefit from minority participation in the process of determining the composition of that programming. The Court observed in 1976 that FCC regulations dealing with employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that

[25] Contrary to the suggestion of the United States (U.S. Br. at 28 n.18), the Commission's decision to repeal the content-based fairness doctrine regulation that was upheld in *Red Lion* does not diminish the interest in structural policies, of which the minority enhancement credit and other minority ownership policies are examples, that seek to allocate licenses so as to promote diversity. The FCC eliminated the fairness doctrine principally because it concluded that the fairness doctrine was a content-based regulation of speech that unduly intruded on, and chilled, broadcasters' first amendment rights. *See Syracuse Peace Council*, 2 FCC Rcd 5043, 5052 (1987), *reconsid. denied*, 3 FCC Rcd 2035, 2041 n.56 (1988), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990). Indeed the Commission expressly emphasized in the fairness doctrine proceeding that its action did not "call[] into question the constitutionality of our content-neutral structural regulations designed to promote diversity." 3 FCC Rcd at 2041 n.56. *See also Shurberg*, 876 F.2d at 944 & n.24 (Wald, C.J., dissenting).

its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. at 670 n.7.

B. The Minority Enhancement Credit Also Serves The Compelling Governmental Interest In Remedying The Effects Of Past Discrimination.

Unlike the interest in broadcast diversity, which the Court is asked herein to accept as a compelling governmental interest for purposes of race-conscious policies, the Court has already identified the remedying of past discrimination as such an interest. The Chief Justice and Justice White joined Part II of Justice O'Connor's opinion in *Croson*, which stated that although general societal discrimination was not a sufficient factual predicate for race-conscious action at the state and local level, "Congress may identify and redress the effects of society-wide discrimination." *Croson*, 109 S.Ct. at 719 (O'Connor, J.).[26]

Whatever limits may exist on the scope of congressional power in this area, the broadcast industry is an appropriate area within which Congress "may identify and redress the effects of society-wide discrimination," *Croson*, 109 S.Ct. at 719 (O'Connor, J.), because a federal licensing agency has played a major role in the establishment of ownership patterns in this industry.

Broadcasting, unlike other industries, such as the construction industry in *Fullilove* and *Croson*, involves the use of a unique, limited resource pursuant to a system of government licensing. The most desirable licenses—those using the frequencies with widest coverage and in the largest communities—were issued during the formative years of the industry, which also happened to be when societal discrimination against minorities was at its peak.[27] These stations were obtained at a modest cost by today's standards.[28] Entrenched ownership patterns understandably have developed because, as the Court has recognized, the Commission has "consistently acted on the theory that preserving continuity of meritorious service furthers the public interest." *FCC v. NCCB*, 436 U.S. at 805. The FCC's justifiable efforts to preserve existing meritorious service have, however, had the effect of inhibiting the opportunities for minorities to own those desirable broadcast stations that were initially licensed during the period when minorities did not participate in the industry either as owners or employees. *See, e.g., Minority Task Force Report* at 10 (noting the difficulty in minorities' entry into the broadest industry by applying for a new station on an unused frequency because "there are very few unused frequencies available, particularly in communities of substantial size.").[29]

Thus, after more than forty years of FCC licensing of radio and television stations—from 1934 until 1978—less than one per cent of those stations were controlled by minorities, despite the fact that minorities represented approximately 20 per cent of the population. *1978 Mi-*

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[26] Three other justices have in the past indicated that race-conscious measures may be an appropriate remedy for societal discrimination even when the policies are adopted at the state and local level. *See Bakke*, 438 U.S. at 362, 369-73 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part); *id.* at 396, 399-400 (Marshall, J.). Justice White also joined in Part II of Justice O'Connor's opinion in *Croson*, which, as noted, confines to Congress the power to remedy societal discrimination.

[27] Percy Sutton, Chairman of Inner City Broadcasting, testified before a congressional committee in 1989: "When I sought—when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station. There was a building, sir, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent." *1989 Hearing on Minority Ownership* at 16.

[28] During that same testimony, Percy Sutton described this effect of past discrimination as a "black tax": "[M]inorities, and specifically minorities who are of African descent, have not had the opportunity. In the past, I remarked upon this as a black tax. That is, when we buy a radio station now, we must pay much more money." *1989 Hearing on Minority Ownership* at 16.

[29] As noted below (n.48), the Commission has sought to address the lack of available frequencies by adding frequencies for new applicants.

nority Policy Statement, 68 F.C.C.2d at 981. Such minority ownership had increased to only 3.5% by 1988. *See CRS Report* at CRS-9. The Conference Report on the 1982 lottery legislation found that this severe underrepresentation of minorities did not occur by chance, but was one of the "effects of past inequities stemming from racial and ethnic discrimination. . . ." H.R. Rep. No. 765 at 43. The minority enhancement credit thus is a remedial effort in the broad sense: "it seeks to address (or remedy) a societal problem (the underrepresentation of minorities in the broadcast field, and the consequent lack of diverse programming) which has been caused by past racial discrimination." *Shurberg*, 876 F.2d at 953 n.48 (Wald, C.J., dissenting).

Insofar as the minority enhancement credit is intended to serve remedial goals, Congress is entitled to more than its "customary deference." *Rostker v. Goldberg*, 453 U.S. at 64. Although this case involves the licensing conduct of a federal agency, the fifth amendment's due process clause contains an equal protection guarantee similar to that found in the fourteenth amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). It is thus significant, as Justice O'Connor pointed out in *Croson*, that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 109 S.Ct. at 719 (O'Connor, J.) (emphasis in original), *citing Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *Ex parte Virginia*, 100 U.S. 339, 345 (1880).[30] Con-

[30] *See also Croson*, 109 S.Ct. at 736 (Scalia, J.) ("We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. . . . [I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment . . . —and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed . . . ."); *Shurberg*, 876 F.2d at 939 n.13 (Wald, C.J., dissenting) ("[W]hile the congressional judgment is not dispositive, it surely makes a difference. Congress has far broader powers than does an administrative agency; its findings of fact are entitled to greater respect; and, unlike the agency, it need not compile a formal record or issue an opinion. Moreover, section 5 of the fourteenth amendment entrusts Congress with the authority to implement equal protection guarantees. These factors do not obviate the need for judicial review, but they do shape the contours of our inquiry.").

gress' broad remedial powers to employ race-conscious policies to remedy the effects of past discrimination, based on its expansive authority generally and enhanced by the fourteenth amendment, have been acknowledged repeatedly. *See, e.g., Fullilove*, 448 U.S. at 477-80 (Burger, C.J.); *id.* at 502-03 (Powell, J.); *Croson*, 109 S.Ct. at 719 (O'Connor, J.); *id.* at 736-37 (Scalia, J.). This power should be no less available when Congress finds it necessary to enforce equal protection guarantees through the public interest based licensing activities of a federal agency such as the FCC.

III. THE MINORITY ENHANCEMENT CREDIT IS NARROWLY TAILORED TO ACHIEVE ITS INTENDED GOALS.

A. The Minority Enhancement Credit Is Only One Factor In The FCC's Multi-Factor Evaluation Of Competing Applicants For Broadcast Licenses.

In his decision in *Bakke*, Justice Powell found constitutional a college admissions program, such as Harvard College's, under which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet . . . does not insulate the individual from comparison with all other candidates." 438 U.S. at 317. Justice Powell added:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all con-

> sideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 318. The minority enhancement credit in FCC comparative licensing proceedings operates in a similar manner. Minority ownership is only one part of a multi-factor analysis of the competing applicants. Each applicant is treated as an individual and no applicant is insulated from comparison solely because of his status as a minority.[31]

Thus, while there may be particular cases in which the minority enhancement credit is ultimately determinative because of the facts presented, the Commission's comparative evaluation includes the opportunity for a wide number of factors to be taken into account. It has been recognized that in a comparative proceeding, even a slight disparity can prove to be decisive under the facts and circumstances of a particular proceeding. *See Sacramento Broadcasters v. FCC*, 236 F.2d 689, 693 (D.C. Cir. 1956). Consequently, a prevailing applicant is not preferred because of the importance attached to any one factor but because of the combination of factors which happen to be present in a particular case.

The court of appeals concluded in *West Michigan Broadcasting Co.* that the "FCC comparative evaluation process generally conforms to Justice Powell's model. . . . [I]t explicitly provides for examination of a wide variety

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[31] As we have argued in our brief in No. 89-700 (FCC Br. at 42-43), the absence of such a multi-factor analysis should not be fatal to the race-conscious government program there. *Fullilove*, for example, involved a specific set-aside in which a certain portion of government contracts was reserved for minorities. In a multi-factor evaluation process, however, in which no applicant is insulated from a comparison with other applicants, there is even less basis for claims of constitutionally unequal treatment.

of traits to assess an applicant's potential for increasing diversity and quality of programming." The court of appeals reiterated that conclusion in the decision below. *See Winter Park*, 873 F.2d at 353 (Pet. App. 11a-12a).

More recently the Court addressed this consideration in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In favorably comparing an affirmative action program involving promotion of employees in that case to the Harvard admissions plan discussed by Justice Powell in *Bakke*, the Court said "the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants."[32] The same is true of the operation of the FCC's comparative broadcast licensing policy.

Petitioner relies heavily on the demonstrably erroneous contention that, in practice, the minority enhancement credit is not part of a multi-factor comparison of applicants but, rather, amounts to a *per se* preference for a minority applicant in a comparative licensing proceeding. Petitioner's simplistic listing of initial decisions of Administrative Law Judges (Br. at 23 n.59), as apparent support for its claim that "white male applicants seldom have prevailed in broadcast comparative contests in recent years" (*id.* at 22), is riddled with errors. Numerous FCC rulings, for example, demonstrate that minority or female ownership does not guarantee that an applicant will prevail.[33]

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[32] 480 U.S. at 638. Because the constitutional issues were never presented for argument in *Johnson*, the Court did not reach a determination as to whether the plan could withstand constitutional challenge. *Id.* at 620 n.2.

[33] *See, e.g., Miracle Strip Communications*, 4 FCC Rcd 5064 (1989), *reconsid. denied*, FCC 90-21 (Jan. 21, 1990); *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941 (1985); *Jerome Thomas Lamprecht*, 99 F.C.C.2d 1219, 1223 (Rev. Bd. 1985), *rev. denied*, 3 FCC Rcd 2527 (1988), *appeal pending, Lamprecht v. FCC*, No. 88-1395 (D.C. Cir. June 1, 1988); *Horne Industries, Inc.*, 98 F.C.C.2d 601 (1984); *Vacationland Broadcasting Co.*, 97 F.C.C.2d 485 (Rev. Bd. 1984),

Moreover, the Commission's comparative licensing proceedings are far more complex than Metro's claims suggest.[34] Contrary to Metro's assertions, many factors play a role in the comparative evaluation of applicants, of which the minority enhancement credit is only one. Others include diversification,[35] quantitative integration of ownership and management,[36] local residence,[37] civic participation,[38] coverage area of proposed station,[39] broadcast experience,[40] and environmental impact.[41] Metro's claim

modified, 58 Radio Reg.2d (P&F) 439 (1985); *Absolutely Great Radio, Inc.*, 95 F.C.C.2d 1023 (1983), *rev'd on other grounds, Ventura Broadcasting Co. v. FCC*, 765 F.2d 184 (D.C. Cir. 1984), *modified on remand, Absolutely Great Radio*, 104 F.C.C.2d 1 (1986); *Las Misiones de Bejar Television Co.*, 93 F.C.C.2d 191 (Rev. Bd. 1983), *rev. denied*, FCC 84-97 (May 16, 1984).

[34] Petitioner's claim, for example, that diversification "is seldom a factor in modern comparative hearings" (Pet. Br. at 10) is simply wrong. In fact applicants with other media holdings are often downgraded in a comparative evaluation on diversification grounds. *See, e.g., Sarasota-Charlotte Broadcasting Corp.*, 4 FCC Rcd 8106, 8110 (ALJ 1989); *Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310, 5337 (ALJ 1989); *Perry Television, Inc.*, 4 FCC Rcd 4603, 4619 (ALJ 1989); *The Baltimore Radio Show*, 3 FCC Rcd 6823, 6826 (ALJ 1988), *aff'd*, 4 FCC Rcd 6437 (Rev. Bd. 1989); *Key Broadcasting Corp.*, 3 FCC Rcd 6587, 6598 (ALJ 1988).

[35] *See* n.34 above.

[36] *See, e.g., High Sierra Broadcasting, Inc.*, 96 F.C.C.2d 423, 432 (Rev. Bd. 1983), *rev. denied*, 56 Radio Reg.2d (P&F) 1394 (1984), *aff'd, mem., High Sierra Broadcasting, Inc. v. FCC*, 784 F.2d 1131 (D.C. Cir. 1986).

[37] *See, e.g., Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 945-46 (1985).

[38] *See, e.g., The Baltimore Radio Show*, 4 FCC Rcd at 6440-41.

[39] *See, e.g., 62 Broadcasting, Inc.*, 3 FCC Rcd 4429, 4450 (ALJ 1988).

[40] *See, e.g., James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988). *See also National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987).

[41] *See, e.g., Richardson Broadcasting Group*, 4 FCC Rcd 7989, 7998-99 (ALJ 1989).

that the minority enhancement credit "is dispositive in all but a few cases" (Pet. Br. at 22) is mistaken. Although the FCC has not scientifically surveyed all of its many comparative broadcast licensing proceedings, even of the cases cited by Metro, sixty percent were decided on grounds other than the minority enhancement credit.[42]

[42] Metro acknowledges (Pet. Br. at 23) that in 27 of the 78 cases it cites, the prevailing applicant was not controlled by a minority or woman. Of the remaining cases, at least 20, while involving winning applicants who were minorities or women, were decided on grounds other than the enhancement credit. Indeed, in the very first case cited in Metro's lengthy list, the Administrative Law Judge expressly stated that the winning applicant's "status as a member of a recognized minority group is not of decisional significance. . . ." *Duane Tomko*, 2 FCC Rcd 206, 209 n.3 (ALJ 1987). In numerous other cases cited by Metro, the enhancement credit for minority or female ownership was similarly not the dispositive factor. *See, e.g., Tulsa Broadcasting Group*, 2 FCC Rcd 1149, 1162 (ALJ), *aff'd*, 2 FCC Rcd 6124 (Rev. Bd. 1987), *rev. denied*, 3 FCC Rcd 4511 (1988); *Magdalene Gunden Partnership*, 2 FCC Rcd 1223, 1238 (ALJ 1987), *aff'd*, 2 FCC Rcd 5513 (Rev. Bd. 1987), *reconsid. denied*, 3 FCC Rcd 488 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 7186 (1988); *Moore Broadcast Industries*, 2 FCC Rcd 2754, 2767 (ALJ 1987); *Armando Garcia*, 2 FCC Rcd 4166, 4168 n.1 (ALJ 1987), *aff'd*, 3 FCC Rcd 1065 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 4767 (1988); *Bogner Newton Corp.*, 2 FCC Rcd 4792, 4805 (ALJ 1987); *Gali Communications, Inc.*, 2 FCC Rcd 6967, 6994 (ALJ 1987); *62 Broadcasting, Inc.*, 3 FCC Rcd 4429, 4450 (ALJ 1988), *aff'd*, 4 FCC Rcd 1768, 1774 (Rev. Bd. 1989), *rev. denied*, FCC 90-48 (Feb. 13, 1990); *Key Broadcasting Corp.*, 3 FCC Rcd 6587, 6600 (ALJ 1988); *Beaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 581, 585 (ALJ 1989); *Corydon Broadcasting, Ltd.*, 4 FCC Rcd 1537, 1539 (ALJ 1989), *remanded*, Order of Dec. 6, 1989 (Rev. Bd.); *Perry Television, Inc.*, 4 FCC Rcd 4603, 4618, 4620 (ALJ 1989); *Radio Delaware, Inc.*, 4 FCC Rcd 5555, 5564 (ALJ 1989); *Shawn Phalen*, 4 FCC Rcd 5714, 5726 (ALJ 1989), *remanded*, 5 FCC Rcd 53 (Rev. Bd. 1990); *Poughkeepsie Broadcasting Limited Partnership*, 4 FCC Rcd 6543, 6551 (ALJ 1989); *Inlet Broadcasting Co., Inc.*, 4 FCC Rcd 6760, 6762 (ALJ 1989); *Don H. Barden*, 4 FCC Rcd 7043, 7045 (ALJ 1989); *Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7802, 7812 (ALJ 1989); *Richardson Broadcasting Group*, 4 FCC Rcd 7989, 7999 (ALJ 1989); *Silver Springs Communications, Inc.*, 5 FCC Rcd 469, 479 (ALJ 1990).

Nonetheless, the purpose of the enhancement credit for minority ownership is to encourage minorities to apply for licenses and to increase the number of stations owned by minorities. It is natural to expect that there would be an increasing number of minorities who apply for licenses and an increasing number of minority applicants who prevail in comparative proceedings. Still, minority ownership is, in fact, only one of many factors that the Commission considers in granting license applications, and the mere existence of minority ownership is not dispositive in the analysis.

It nevertheless remains that despite more than a decade of operations of this policy, in conjunction with other FCC ownership policies, minorities, while controlling significantly more stations than a decade ago, continue to be severely underrepresented among owners of radio and television stations, controlling at most 3.5% of radio and television stations. *See CRS Report* at CRS-9. To the extent that the minority enhancement credit program has played a role in encouraging more minority applicants and in the limited growth in minority controlled radio and television stations, it is ironic that Metro attempts to turn the program's limited success against it to argue that *any* consideration of minority ownership as part of the FCC's multi-factor evaluation of applicants for broadcast stations is unconstitutional.

Nor does the minority enhancement credit involve any "quota" or "set aside." No particular number or percentage of licenses have been reserved for minorities. Non-minorities remain free to compete in all cases subject to this policy, and, as noted above (*see* n.33), minority status does not ensure that an applicant will prevail in a comparative licensing proceeding. As the court of appeals observed, one of a number of factors distinguishing this case from *Croson* is that the plan at issue in *Croson* involved " 'an unyielding racial quota' " while the minority enhancement credit policy "is even more flexible than the *Fullilove* set-aside plan: it does not involve any quotas . . . and minority ownership is simply

one factor among several that the Commission takes into account in the award of broadcast licenses." *Winter Park*, 873 F.2d at 354 (Pet. App. 13a-14a).

Finally, the minority enhancement credit policy involves individualized consideration of each applicant that seeks credit for minority ownership. Opportunity is available for the Commission, as well as for competing applicants, to test the proposals of an applicant seeking credit for minority ownership to ensure, for example, that the applicant is bona fide.[43] As part of this individualized consideration, credit is given for minority ownership only where the minority owner will devote "substantial amounts of time on a daily basis" to the management of the station. *1965 Policy Statement*, 1 F.C.C.2d at 395. Thus the weight given to minority ownership in a comparative proceeding bears a direct relationship to the extent to which those owners are involved in management of the station on a day-to-day basis and can be expected, as a result, to have an impact on the station's programming.

B. A Nexus Between Ownership And Programming Has Been Established.

The Court has sustained as rational the Commission's conclusion "that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *FCC v. NCCB*, 436 U.S. at 796. The conference report for the 1982 lottery legislation stated that the "nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." H.R. Rep. No. 765 at 40. The Senate report for the FCC's appropriations bill in 1987 reiterated this conclusion,

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[43] Applications that are deemed to involve sham arrangements in which the minority owner is found, in fact, not to be what he or she purports to be, have been rejected by the Commissions. *See, e.g., KIST Corp.*, 102 F.C.C.2d 288, 292 (1985), *aff'd, mem., United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir.1986); *Tulsa Broadcasting Group*, 2 FCC Rcd at 6129-30.

stating that "[d]iversity of ownership results in diversity of programming." S. Rep. No. 100-182 at 76.[44]

Race has been recognized as a relevant factor in considering a speaker's potential to contribute to diversity. *Bakke*, 438 U.S. at 311-19 (Powell, J.). In the broadcast context, the Court has indicated that the FCC was justified in proceeding on the premise that the employment of minorities at broadcast stations, which the FCC expected would include their participation in programming decisions, would have a beneficial impact on broadcast programming "by ensuring that [it] fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. at 670 n.7.

The relevance of race in pursuing the goal of diversity was also supported by the Kerner Commission:

> The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slights and indignities are part of the Negro's daily life, and many of them come from what he now calls the "white press" —a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society. . . . The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in the newspapers and sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American.

Kerner Commission Report at 203. A decade later, the United States Commission on Civil Rights endorsed this view, summarizing that the Kerner Commission had "concluded that a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks. A similar conclusion could be drawn in regard to other racial and ethnic minorities . . . ." United States Commission on Civil Rights, *Window Dressing On The Set: Women and Minorities in Television* 2 (1977).

Testimony in congressional hearings concerning minority participation in the broadcasting industry has echoed the same themes:

> [T]he importance of minority ownership is clear. Minorities need to have a voice that speaks to them, for them and about them. Black owned radio and television stations are not afraid to push voter registration. Black owned broadcast stations are not afraid to talk about South Africa. In particular, black owned radio stations give black politicians a chance to be heard. Black people listen to black radio. Because black radio stations still subscribe to the concept of operating in the public interest. Black radio is local. It's the church program on Sunday, it's the community school, it's the forum for issues that many non-minority owned radio owners would consider too "sensitive," too "one issue oriented" or "not sexy enough."

Hearings on H.R. 5373 at 164-65 (statement of Jesse L. Jackson).

There is, of course, "no *guarantee*" that minority ownership will produce a result in terms of a station's programming any different from that which would occur absent a minority owner. *See Shurberg*, 876 F.2d at 944 (Wald, C.J., dissenting) (emphasis in original). Congress, however, could reasonably conclude that an increase in the ownership of broadcast stations by sig-

[44] The appropriations bill terminated an inquiry, which, as noted earlier, the Commission had begun in 1986 to examine whether *it* had established an adequate factual basis, in light of its then understanding of developing legal standards governing race-conscious policies, for a determination that there exists "a nexus between minority/female ownership and viewpoint diversity . . . ." *Notice of Inquiry*, 1 FCC Rcd at 1317. *See* p. 13 above. The Senate Report stated that "the inquiry is unwarranted" in light of Congress' repeated findings that such a nexus does exist. S. Rep. No. 100-182 at 76.

nificant, but severely underrepresented, groups would increase diversity on the broadcast airwaves.[45]

C. Adoption Of The Policy Followed Implementation Of Alternative Methods Of Addressing The Lack Of Minority Ownership That Proved Inadequate.

The Court in other contexts has emphasized that an important consideration in a "narrowly tailored" analysis is whether there has been prior consideration of the use of alternatives. *See Croson*, 109 S.Ct. at 728; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove*, 448 U.S. at 463-67 (Burger, C.J.); *id.* at 511 (Powell, J.). In this regard, the FCC for many years followed policies of encouraging diversity of ownership *without* consideration of race, i.e., it sought to minimize concentration of control of broadcast stations and thus maximize the opportunities for individuals or organizations to control stations. *See* pages 3-5 above. As indicated earlier, despite following such policies for several decades, minorities remained severely underrepresented in the ownership of broadcast stations. Moreover, the minority enhancement credit was adopted after the FCC specifically found that equal employment opportunity rules and ascertainment policies alone were insufficient to accomplish significant minority participation in programming. *See 1978 Minority Policy Statement*, 68 F.C.C.2d at 981; *Random Selection/Lottery Systems*, 88 F.C.C.2d 476, 489-90 (1981).

The FCC had already taken a number of actions specifically addressed to entry barriers that had been identified as impeding minority ownership before Congress acted in 1987 to compel the minority enhancement credit and other race-conscious policies. For example, the minimum showing necessary to demonstrate financial qualifications to receive a radio or television station license was reduced in order to lower this barrier to minority

[45] Even where a statute is analyzed under a strict scrutiny standard of review, the statute can be sustained on the basis of reasonable congressional findings and conclusions. *Fullilove*, 448 U.S. at 496, 503 n.4 (Powell, J.).

applicants.[46] In addition, the Commission adopted procedures to disseminate more widely information about the availability of potential minority buyers of broadcast stations.[47] The Commission also has taken steps to increase the total number of radio and television stations, thus increasing the opportunities for minorities to enter the broadcast industry.[48] Despite these substantial initiatives not involving racial considerations, the Commission and Congress concluded that the "'dearth of minority ownership' in the telecommunications industry" continued to be a "serious concern." *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 852 (1982); H.R. Rep. No. 765 at 43-44; S. Rep. 100-182 at 76.[49]

[46] Section 308(b) of the Communications Act, 47 U.S.C. 308(b), authorizes the FCC to elicit information from applicants regarding their financial qualifications to operate a station. The Commission had required applicants to demonstrate the availability of sufficient funds to construct and operate the station for one year. *See Ultravision Broadcasting*, 1 F.C.C.2d 544 (1965). This requirement was identified by the Minority Ownership Task Force as one of the barriers to increased minority ownership. *See Minority Task Force Report* 11-12. The requirement subsequently was reduced to three months. *See New Financial Qualifications for Aural Applicants*, FCC 78-556 (Aug. 2, 1978); *New Financial Qualifications Standard for Broadcast Television Applicants*, FCC 79-299 (May 11, 1979).

[47] *See* FCC EEO-Minority Enterprise Division, *Minority Ownership of Broadcast Facilities: A Report* 8-9 (Dec. 1979) (describing agency establishment of "a listing of minority persons interested both in purchasing broadcast stations and in making themselves known to broadcast station sellers and brokers").

[48] *See, e.g., Availability of FM Broadcast Assignments*, 101 F.C.C.2d 638 (1985), *reconsid. granted in part and denied in part*, 59 Radio Reg.2d (P&F) 1221 (1986), *aff'd, National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987); *Clear Channel Broadcasting in the AM Band*, 78 F.C.C.2d 1345 (1980); *Low Power Television Service*, 51 Radio Reg.2d (P&F) 476 (1982), *reconsid. granted in part and denied in part*, 53 Radio Reg.2d (P&F) 1267 (1983).

[49] Petitioner's claim (Pet. Br. at 39) that the FCC "believes [diversity] already has been, and is being, achieved" is mistaken insofar as it suggests a determination by the FCC that some op-

The range of available alternatives for increasing minority participation in broadcast programming is limited. Section 3(h) of the Communications Act, 47 U.S.C. 153(h), for example, provides that a broadcaster "shall not . . . be deemed a common carrier." The Court has held that "consistently with the policy of the Act to preserve editorial control of programming in the licensee," Section 3(h) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (footnote omitted). The Court, moreover, has made clear that "the important purposes of the Communications Act" to preserve for broadcasters a high degree of editorial discretion and to minimize governmental control over broadcast content are "grounded in the First Amendment." *FCC v. League of Women Voters of California*, 468 U.S. 364, 379-80 (1984) (footnote omitted), *citing CBS, Inc. v. DNC*, 412 U.S. at 94, 110, 126. Given the limitations on its authority in this area, the FCC has traditionally sought to promote diversity by structural regulations, of which the minority enhancement credit is one example, " 'without on-going government surveillance of the content of speech.' " *FCC v. NCCB*, 436 U.S. at 801-02; *see also id.* at 780-81 and nn.1-3.

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timal level of program diversity in broadcasting has been achieved rendering any further efforts to promote diversity unnecessary. Petitioner relies on language from the FCC's radio deregulation proceeding in which the Commission held that detailed regulation of licensees' operation of their stations was no longer necessary. *See Deregulation of Radio*, 84 F.C.C.2d 968, 1066 (1981), *on reconsid.*, 87 F.C.C.2d 797 (1981), *aff'd in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C.Cir. 1983). The FCC did not, however, eliminate much of its detailed regulation of radio because it concluded that fostering program diversity was no longer an important part of its regulatory mission, but rather because it concluded that those particular regulations were no longer necessary and were counterproductive. *See* 84 F.C.C.2d at 977-83, 1067-68. Significantly, the Commission emphasized that it was not eliminating the minority ownership policies. *Id.* at 977. *See also* n.25 above.

Even where structural regulations are concerned, the FCC's steps to promote diversity have been limited by important countervailing public interest considerations. "[B]oth the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause." *FCC v. NCCB*, 436 U.S. at 805-06 (citations omitted). The renewal expectancy policy, however, severely limits minorities' ability to compete for existing, established stations, which occupy the overwhelming majority of available broadcast frequencies.[50]

Based on the Commission's experiences and the nature of the broadcasting industry, Congress could reasonably conclude that the minority enhancement credit is an appropriate and limited method of enhancing minorities' ability to enter the broadcast industry without undermining the important goal of stability in the industry and without, as shown below, significantly harming nonminorities. "In no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove*, 448 U.S. at 480 (plurality opinion) (citation omitted).

Chief Justice Berger noted in *Fullilove* that the set-aside there in issue was "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment." 448 U.S. at 489 (footnote omitted). The same can be said of the minority enhancement credit. When Congress first ordered the FCC to retain the program in 1987, it did so for one fiscal year. Congress has twice ordered the program extended on a yearly basis.

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[50] As noted above (*see* n.48), the Commission has sought, as part of its overall efforts to promote minority ownership, to make available new allocations of radio and television stations, including new services such as low power television, for which minorities can compete without having to overcome an incumbent licensee's renewal expectancy.

See n.8 above. Moreover, as the Court held in *Johnson v. Transportation Agency*, 480 U.S. at 639-40, "[e]xpress assurance that a program is only temporary may be necessary only if the program actually sets aside positions according to specific numbers." As noted earlier (p. 40 above), the minority enhancement policy sets aside no minimum number or percentage of licenses for minority applicants.

D. The Policy's Impact On Nonminorities Is Minimal.

We do not contend that a Congressionally-enacted race-conscious program in which a benefit is awarded on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The minority enhancement credit, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case, or more generally, from the perspective of all nonminorities interested in entering the broadcast industry.

When a race-conscious policy involves entry into employment, rather than layoffs of established employees, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-83 (Powell, J.); *id.* at 294-95 (White, J.). FCC comparative licensing proceedings are directly analogous to entry into employment rather than layoffs. In such employment entry situations, the Court has held that applicants have no settled expectations to be hired. The proceeding below, like virtually all proceedings in which the minority enhancement credit would be applicable, involved competing applicants for a license to construct a new broadcast station, all of whom were qualified to be licensees.[51] The FCC's respon-

[51] The minority enhancement credit theoretically could be applied in a comparative *renewal* proceeding, in which a new applicant seeks to compete against a renewal applicant for a license to operate a station. However, because of the renewal expectancy that is ordinarily earned by a renewal applicant (*see* p. 47 above), the likelihood that a comparative renewal proceeding would turn on the minority enhancement credit is remote.

sibility is to grant licenses in the "public interest, convenience and necessity." 47 U.S.C. 307, 309. Applicants thus have no settled expectations that their application will be granted without consideration of public interest factors such as the minority enhancement credit. The Court has held, for example, that there is "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." *FCC v. NCCB*, 436 U.S. at 799. The Court should find here that the fifth amendment also does not prevent promotion of the public interest in diversity through the limited tool of the minority enhancement credit. *See Shurberg*, 876 F.2d at 951 (Wald, C.J., dissenting) (Distress sale policy "can hardly be said to disrupt settled expectations of potential licensees."); *Johnson v. Transportation Agency*, 480 U.S. at 638 ("[P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner.").

Chief Justice Burger stated in *Fullilove*, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484, *quoting Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). *See also Wygant*, 476 U.S. at 280-81 (Powell, J.) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1990

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* The Acting Solicitor General has authorized the filing of this brief in order for the Court to have the benefit of the views of the Commission. The views of the United States will be expressed in a brief filed by the Acting Solicitor General.

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